

No. SC86144

IN THE MISSOURI SUPREME COURT

SCOTT PONTIUS,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

**Appeal from the Circuit Court of St. Charles County
The Honorable Terry R. Cundiff, Judge**

APPELLANT'S SUBSTITUTE BRIEF

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Jurisdictional Statement

This appeal is from a judgment of the Circuit Court of St. Charles County reinstating the driving privileges of Scott E. Pontius (Pontius), after revocation of those privileges by the appellant, the Director of Revenue (Director), following Pontius' refusal to submit to a test pursuant to §577.041, RSMo 2000. After an opinion by the Court of Appeals, Eastern District, this Court took transfer of this case on the Director's application. Therefore, jurisdiction lies in this Court. Article V, Section 10, Missouri Constitution (as amended, 1982).

Statement of Facts

On March 21, 2002, at 9:22 p.m., various officers with the Lake St. Louis Police Department responded to the scene of an automobile collision (LF 17). The collision, which occurred outside the Days Inn Pub, involved two motor vehicles, one of which was registered to Pontius (LF 17-18). When pulling out of a parking spot outside the Days Inn Pub, the driver backed into the passenger side of a stopped car (LF 18). After hitting the stopped car, the suspect driver exited his vehicle, looked at the damage, and then asked the occupants of the vehicle he hit not to call the police (LF 18). When the driver of the parked car picked up his cell phone and started to call police, the suspect driver walked back into the Days Inn Pub without giving his name or insurance information (LF 18).

When the officers responded to the scene, they took the statements of the individuals who were in the car that was hit (LF 17-21). The driver of the struck car provided the police with a description of the suspect vehicle and the suspect driver and his actions (LF 18). Because the suspect driver had left the scene of the crash, the officers ran his license plates in order to identify him (LF 18). The vehicle involved in the crash came back as registered to Pontius (LF 18).

In order to find Pontius, the officers canvassed the Days Inn Pub (LF 20). While the officers were in the pub, Pontius' female friend called and asked to speak with the officers (LF 20). The friend told Officer Gilliam that she had driven Pontius home from the pub (LF 20).

When Officer Gilliam asked to speak with Pontius, the friend refused to allow it (LF 20). She also refused to take Pontius to the police station upon Officer Gilliam's request (LF 20).

At 10:21 that same evening, Officers Gilliam and Bastean went to Pontius' home (LF 20). When the officers arrived at Pontius' home, they noticed that he matched the description of the suspect driver given to them by the witnesses (LF 20). The officers also noticed that there was a strong smell of alcohol on his breath, and that his eyes were watery, bloodshot, and glassy (LF 20). Further, the officers also noticed that Pontius' balance was uncertain, and he had a hard time standing (LF 20).

The officers arrested Pontius for leaving the scene of an accident and for suspicion of driving while intoxicated (LF 20). The Director revoked Pontius' driving privileges pursuant to §577.041, RSMo 2000 (LF 32).

Pontius appealed this determination to the circuit court, and a drug court commissioner found in favor of the Director and approved the revocation of Pontius' driving privileges on December 20, 2002 (LF 32). Pontius asked the court for a new trial/rehearing (LF 34).

At the trial de novo the Director submitted her case "on the record" pursuant to §302.312, RSMo 2000 (Tr. 2; LF 9, 65). The Director had notified Pontius on June 24, 2002, that she would be relying on the Alcohol Influence Report (AIR) at trial (LF 8). Pontius' attorney did not object to any of the information in the AIR save for the witness statements on the grounds that they were hearsay (Tr. 2-7). On April 17, 2003, the trial court found in favor of the Director (LF 57).

On May 14, 2003, Pontius filed his "Motion to Set Aside and Reconsider Judgment" arguing, again, that the court erred in considering "civilian hearsay" (LF 58-59). Only a day prior, on May 13, 2003, the Court of Appeals, Eastern District, held, in *Sooch v. Director of Revenue*, 105 S.W.3d 546 (Mo.App., E.D. 2003), that St. Charles County drug court commissioners lacked jurisdiction to hear drivers license cases and such trials de novo in St. Charles must be heard by associate circuit judges or circuit judges.

On August 18, 2003, following reconsideration, the trial court found that the witness statements were hearsay and could not be considered by the court (LF 65). The court also found that under *Sooch*, a petitioner is entitled to due process, and as such, the witness statements should be excluded as hearsay (LF 61). Finally, the court found that without the witness statements, there was insufficient evidence to meet the Director's burden (LF 61). Therefore, the court ordered the Director to reinstate Pontius' driving privileges (LF 61). The Director appealed this ruling on August 18, 2003 (LF 63). Following an opinion from the Court of Appeals, Eastern District, this Court granted transfer.

Point Relied On

The trial court erred in reinstating Pontius' driving privileges because this ruling misapplies the law and is not supported by substantial evidence, in that *Sooch v. Director of Revenue* has no application here, where Pontius' case was heard by an Article V judge; civilian witness statements that would otherwise be hearsay when offered for their truth are not hearsay when offered to support the officers' reasonable grounds; and the time between the officers' response to the crash scene and the apprehension of Pontius at his home is not determinative of reasonable grounds where officers have evidence that a driver matching Pontius' description in a vehicle registered to Pontius crashed into a parked car, left the scene, and was found at home exhibiting indicia of intoxication, and Pontius never claims – either to the officers or at trial – not to have driven or to have begun drinking after the crash.

Burleson v. Director of Revenue, 92 S.W.3d 218 (Mo.App., S.D. 2003);

Howard v. McNeill, 716 S.W.2d 912 (Mo.App., E.D. 1986);

Swanberg v. Director of Revenue, 122 S.W.3d 87 (Mo.App., S.D. 2003);

Misener v. Director of Revenue, 13 S.W.3d 666 (Mo.App., E.D. 2000);

§302.312, RSMo 2000.

Argument

The trial court erred in reinstating Pontius' driving privileges because this ruling misapplies the law and is not supported by substantial evidence, in that *Sooch v. Director of Revenue* has no application here, where Pontius' case was heard by an Article V judge; civilian witness statements that would otherwise be hearsay when offered for their truth are not hearsay when offered to support the officers' reasonable grounds; and the time between the officers' response to the crash scene and the apprehension of Pontius at his home is not determinative of reasonable grounds where officers have evidence that a driver matching Pontius' description in a vehicle registered to Pontius crashed into a parked car, left the scene, and was found at home exhibiting indicia of intoxication, and Pontius never claims – either to the officers or at trial – not to have driven or to have begun drinking after the crash.

Standard of Review

Review of a trial court's judgment after a trial de novo is governed by the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). The decision of the trial court must be affirmed on appeal unless there is no substantial evidence to support it, the decision is against the weight of the evidence, or the trial court erroneously declares or applies the law. *Id.* at 32; *Eskew v. Director of Revenue*, 17 S.W.3d 159, 160 (Mo.App., E.D. 2000).

If the disputed question is not a matter of contradiction by different witnesses, this court is not required to defer to the trial court's findings of credibility. *Hopkins-Barken v.*

Director of Revenue, 55 S.W.3d 882, 885 (Mo.App., E.D. 2001). "In addition, our standard of review does not permit us to disregard uncontroverted evidence that support[s] the Director's contention that all elements were proved." *Id.* "Deference to the trial court's findings is not required when the evidence is uncontroverted and the case is virtually one of admitting the facts or when the evidence is not in conflict." *Marsey v. Director of Revenue*, 19 S.W.3d 176, 177 (Mo.App., E.D. 2000).

The Director's prima facie case

In a proceeding where a person's license has been revoked for failure to submit to a breath test, the circuit court shall determine only (1) whether or not the person was arrested; (2) whether or not the person refused to submit to the test; and (3) whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle in an intoxicated condition. *Rain v. Director of Revenue*, 46 S.W.3d 584, 587 (Mo.App., E.D. 2001). The term reasonable grounds is "virtually synonymous with probable cause for arrest for driving while intoxicated." *Parres v. Director of Revenue*, 75 S.W.3d 311, 314 (Mo.App., E.D. 2002).

The trial court's misapplication of the law – *Sooch v. Director of Revenue*

The Director met her prima facie case for revocation of Pontius' drivers license. First, under §302.312, RSMo 2000, it is appropriate and permissible for the Director to submit her case on the certified records of the Department of Revenue. *See generally, Tinker v. Director of Revenue*, 125 S.W.3d 329, 331 (Mo.App., E.D. 2003); *Fainer v. Director of Revenue*, 123 S.W.3d 303, 306 (Mo.App., E.D. 2003); *Grace v. Director of Revenue*, 77

S.W.3d 29, 33 (Mo.App., E.D. 2002); *Krieg v. Director of Revenue*, 39 S.W.3d 574, 575 (Mo.App., E.D. 2001).

The Director proceeded on the records here (Tr. 2). Counsel objected to "any hearsay evidence set forth in the State's record, especially hearsay evidence from any civilian witnesses" (Tr. 2). At first, the court was not persuaded by this argument, and ruled in the Director's favor (LF 57). But then, following reconsideration and immediately subsequent to the Court of Appeals, Eastern District's decision in *Sooch v. Director of Revenue*, 105 S.W.3d 546 (Mo.App., E.D. 2003), the trial court reversed itself, and ruled as follows:

The Eastern District in *Sooch v. DOR* (ED 81462) held that the Due Process rights of a Petitioner were denied in a Petitioner for Review [sic] hearing held before a Commissioner appointed under RSMo 478.003. All review of Refusals are Civil in nature and Administrative, 839 SW2d 300. In the past this distinction has been used by the Court to Justify a series of restrictions on the Due Process rights of Petitioners including:

- a) the lack of need for live testimony *McDaniels v. DOR*, 839 SW2d 688 (Mo. App 1999)
- b) the finding that there is no violation of the right of confrontation by using certified AIR reports *Krieg v. DOR*, 39 SW3d [574] (Mo. App. 2001)

c) no hearsay in using only police reports *Mills v. DOR* 964 SW2d 873 (Mo. App. 1998)

The Court hereby holds that since Petitioner is entitled to some Due Process Rights in this case the full scope of those rights should be protected. Accordingly those portions of the police report involving witness statements are classified as inadmissible hearsay and can not be considered by this court in this cause. Absent that evidence the Director has insufficient credible admissible evidence to meet their burden.

(LF 61).

This ruling erroneously declares and applies the law. *Sooch v. Director of Revenue*, simply held that a drug court commissioner did not have jurisdiction to hear a trial de novo in a revocation case, and such cases must be held in front of an Article V judge. *Sooch v. Director of Revenue*, 105 S.W.3d at 547. And unlike *Sooch*, while in this case a drug court commissioner heard the matter initially, the trial court took up the matter twice after that, ruling once in favor of the Director, and finally in favor of Pontius, following his motion for reconsideration (LF 32-33, 57-61). Therefore, the trial court's reliance on *Sooch* is entirely misplaced. As noted, §302.312, RSMo 2000, allows the Director to submit her case on the records, this does not violate due process, and this rule has not been changed in any measure by *Sooch*.

Finally, if Pontius had a problem with the Director submitting her case on the records – a fact he knew well in advance of his first trial, not to mention the second (LF 8) – he could have called the officers to testify himself. "The Missouri Administrative Procedure Act . . . provides each party with the opportunity to call and examine witnesses, to introduce exhibits and to impeach any witness regardless of which party first called him to testify.'" *Collins v. Director of Revenue*, 691 S.W.2d 246, 254-256 (Mo. banc 1985). Pontius could have subpoenaed these witnesses, but he chose not to do so.

Reasonable Grounds

Had the trial court properly considered the Director's records, those records would have revealed that on March 21, 2002, officers arrested Pontius for leaving the scene of an accident (LF 20). At the police station that night, Pontius, after being advised of Missouri's consent law, refused to submit to field sobriety tests or take a breath test (LF 20). Pontius has never disputed (LF 20) and, indeed, concedes, that he was arrested and that he refused a test. *Pontius v. Director of Revenue*, No. ED83375, slip op. at 4 (Mo.App., E.D. May 11, 2004).

As to reasonable grounds, when the officers responded to the scene of the collision, which occurred outside the Days Inn Pub, the witnesses informed the officers that a car registered to Pontius hit their stopped car (LF 17-18). After hitting the stopped car, Pontius exited his vehicle, looked at the damage, and then asked the occupants of the vehicle he hit not to call the police (LF 18). Pontius then walked back into the Days Inn Pub without giving his name or insurance information (LF 18).

While the officers were canvassing the Days Inn Pub, Pontius' friend called and asked to speak with the officers (LF 20). The friend told the officers that she had driven Pontius home from the pub and refused to allow the officers to speak with Pontius (LF 20). She also refused to take Pontius to the police station (LF 20).

Later that evening, the officers went to Pontius' home (LF 20). When the officers arrived at Pontius' home they noticed that he matched the witnesses' description, that he had a strong smell of alcohol on his breath, and that his eyes were watery, bloodshot, and glassy (LF 18, 20). An odor of alcohol on a person is one of the classic indicia of intoxication. *Saladino v. Director of Revenue*, 88 S.W.3d 64, 70 (Mo.App., W.D. 2002). Further, the officers also noticed that Pontius' balance was uncertain and he had a hard time standing (LF 20). This evidence is more than sufficient to establish reasonable grounds. *See Soest v. Director of Revenue*, 62 S.W.3d 619, 621 (Mo.App., E.D. 2001) (reasonable grounds established where officer observes Soest swerve off the road once, Soest says she had one beer, and she performs poorly on the horizontal gaze nystagmus test).

The trial court, to the contrary, found that "those portions of the police report involving witness statements are classified as inadmissible hearsay and can not be considered by this court in this cause" (LF 61). But just as the trial court misapplied the holding of *Sooch*, so too it compounded its error by classifying the witness statements as hearsay. Information given by eyewitnesses to the arresting officer directly, even if such statements would otherwise be hearsay, is admissible to establish probable cause because it is not offered for its truth, but to explain the basis for a belief that probable cause to arrest existed. *Parres v. Director of*

Revenue, 75 S.W.3d at 314. See also *Rain v. Director of Revenue*, 46 S.W.3d at 588; *Hunter v. Director of Revenue*, 75 S.W.3d 299, 303 (Mo.App., E.D. 2002). Cases that have so held are legion.

For example, in *Hunter v. Director of Revenue*, the Director revoked the driving privileges of a motorist for failure to submit to a test of her blood. *Hunter v. Director of Revenue*, 75 S.W.3d at 301. Before the trial court, the Director submitted the case on certified records. *Id.* at 301. The motorist in *Hunter* objected to the witness statements in the report as hearsay and her objection was sustained. *Id.* at 302. On appeal, the Court of Appeals, Eastern District, specifically stated that the trial court erred in refusing to admit the statements because they related to probable cause and therefore were not hearsay. *Id.* at 303.

Similarly, in *Parres v. Director of Revenue*, the Director revoked the motorist's drivers license for failure to take a breath test. *Parres v. Director of Revenue*, 75 S.W.3d at 313. At the trial de novo, the circuit court held that there was not sufficient probable cause for the arrest and reinstated the driving privileges of the motorist. *Id.* at 313. The Court of Appeals, Eastern District, reversed the trial court and held that even though the information given to the officer by witnesses would otherwise be hearsay if offered for its truth, it could be used to establish probable cause to arrest. *Id.* at 314.

Likewise, in *Burleson v. Director of Revenue*, the Director again revoked the driving privileges of a motorist for failure to submit to a breath test. *Burleson v. Director of Revenue*, 92 S.W.3d 218 (Mo.App., S.D. 2003). Again, the Director submitted the case on certified records. *Id.* at 220. The motorist objected to the evidence as hearsay. *Id.* The trial

court held that the record contained inadmissible hearsay evidence and excluded it. *Id.* The Court of Appeals, Southern District, reversed, holding that had the Director offered the statements for the purpose of proving the motorist was the driver of the car, the statements would have been hearsay. *Id.* at 221. But the witness statements could be admitted because they were offered instead to show that the officers had probable cause for the arrest. *Id.*

During the trial de novo, Pontius argued that *Burleson* stood for the proposition that witness statements could not be used to prove that Pontius "was, in fact, driving the vehicle" (Tr. 4). True. But, as stated in *Burleson*, witness statements can be offered as non-hearsay evidence to show that the officers had reasonable grounds to believe that a person was driving a vehicle in an intoxicated condition. *Id.* Besides, under §577.041.4, RSMo 2000, the issue is not whether a person was actually driving but whether the officer had reasonable grounds to believe that the person was driving a vehicle in an intoxicated condition. *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 622 (Mo. banc 2002).

The Court of Appeals, Eastern District, however, did not enter this fray; the Court concluded that even if the witness statements were considered, the Director had failed to establish reasonable grounds. In particular, the Eastern District found that "the evidence only demonstrates [Pontius] appeared to be intoxicated at his home one hour after the accident." *Pontius v. Director of Revenue*, slip op. at 5. While it is correct that the officers did not find Pontius at his home until almost an hour after responding to the crash scene, this does not compel a holding that the officers lacked reasonable grounds.

To the contrary, Missouri courts have never reduced the probable cause factual calculus to a time-elapsd litmus test. In *Howard v. McNeill*, 716 S.W.2d 912 (Mo.App., E.D. 1986), for example, Howard was involved in a car crash, and when the officer arrived at the scene, a civilian witness indicated that Howard had been driving and that he had permitted Howard to leave the scene to seek medical treatment. *Id.* at 914. The witness also told the officer that Howard had left in a friend's vehicle, and the witness provided a description of that vehicle. *Id.* Fifty to sixty minutes after the crash had occurred, the officer stopped a car matching the description of Howard's friend's car. *Id.* Howard appeared intoxicated and the officer placed him under arrest. *Id.*

Following revocation of his driving privileges for refusal to take a test, Howard petitioned for review and at the hearing, he admitted that he was intoxicated when he was arrested, but maintained that he drank whiskey that his friend gave him after the collision. *Id.* Howard's friend corroborated this post-crash drinking claim. *Id.* But neither Howard nor his friend made any such statements to the officer at the time of arrest. *Id.* The only facts before the officer at the time of arrest, therefore, were Howard's "undisputed inebriation at the time and his failure to go to the hospital." *Id.*

On these facts, the Court of Appeals, Eastern District, reversed the trial court and found that the officer had sufficient information to formulate reasonable grounds:

At the time of the arrest in this case, it was clear that respondent was intoxicated, and Officer Cordia was possessed of reliable information that approximately one hour before he encountered

respondent, respondent had been operating a motor vehicle and was involved in a collision. Furthermore, although respondent had been permitted to seek medical attention, he did not go to the hospital, possibly in an effort to avoid being seen by neutral observers. Such facts provided Officer Cordia with "reasonable grounds" to believe that respondent had been intoxicated at the time of the collision and authorized the arrest.

Id. at 915.

In the present case, officers responded to the scene outside of the Days Inn Pub at 9:22 p.m. (LF 17). After speaking with witnesses, the officers found out that the offending vehicle was registered to Pontius and the driver of the offending vehicle had left the scene and "walked back into the Pub" after the driver of the parked car started to call police on his cell phone (LF 18). Once inside the pub, the officers received a phone call from Pontius' friend, who indicated that she had driven him home, that they could not speak with him, and that she would not transport him to the police department, despite their requests (LF 20). Pontius' actions in leaving the scene when it looked as if police would be called, having a friend drive him home, and his friend's refusal to cooperate with law enforcement requests could be seen, as in *Howard*, as "an effort to avoid being seen by neutral observers." *Howard v. McNeill*, 716 S.W.2d at 915. Indeed, that Pontius had a friend drive him home after having hit a parked vehicle suggests that Pontius figured out that he was in no condition to drive.

The officers arrived at Pontius' residence at 10:21 p.m., 59 minutes after responding to the scene of the crash at the Days Inn Pub (LF 20). Pontius matched the description of the driver provided by the witnesses and appeared intoxicated at that time, and the officers arrested him (LF 18, 20).

As in *Howard*, Pontius never told the civilian witnesses or the police that he only became intoxicated after the crash. Likewise, Pontius never asserted that he had not been driving, and the car was registered to him and he matched the witnesses' description (LF 18-20). And, while it is true that Pontius subsequently walked into a pub where, presumably, alcoholic beverages are served, there is zero evidence on this record that Pontius actually had such a beverage when he went there after the crash. In contrast to *Howard*, Pontius did not offer any sort of post-crash drinking testimony at the hearing – indeed, Pontius did not testify at all. Any supposition that Pontius may have been sober when he crashed into a parked car and only drank after the collision is precisely that – supposition that cannot support judgment in Pontius' favor. See *Testerman v. Director of Revenue*, 31 S.W.3d 473, 483 (Mo.App., W.D. 2000).

Swanberg v. Director of Revenue, 122 S.W.3d 87 (Mo.App., S.D. 2003), presents similar facts – facts that showed reasonable grounds. In *Swanberg*, as here, the officer came upon a crash scene and the driver had already left the area. *Id.* at 89. Thirty-seven minutes later, the officer located Swanberg at a nearby convenience store, where Swanberg admitted to driving. *Id.* Swanberg exhibited characteristics of an intoxicated person and performed poorly on field sobriety tests. *Id.* The officer placed Swanberg under arrest. *Id.*

Swanberg petitioned for review of the Director's revocation of his license, and testified at the hearing that he had crashed around 3:30 a.m., had walked to a nearby convenience store where he conversed with the clerk, left the store with a friend and drank at that point, then returned to the convenience store where the officer found him. *Id.* at 89. The convenience store clerk also testified for Swanberg, and indicated that Swanberg did not appear to be intoxicated when he first arrived at the store. *Id.* at 89 n.2.

On these facts, the Court of Appeals, Southern District, found that the officer had reasonable grounds. Significantly, the record was "devoid of a showing that Officer Windle had any knowledge that Driver had consumed alcohol after the accident." *Id.* at 91. Coupled with Swanberg's admission that he was intoxicated at the time of arrest, and the fact that he exhibited numerous indicia of intoxication, this provided the officer with reasonable grounds to believe that Swanberg had been driving while intoxicated. *Id.*

Here, the officers observed indicia of intoxication upon coming in contact with Pontius at his home (LF 20). And, in contrast with *Swanberg*, Pontius never offered any evidence that would blunt the officers' natural conclusion that Pontius had crashed into the parked car and had been intoxicated when he did so. In particular, Pontius never told the officers that he was not the driver, or that he had only started drinking after the crash, either in the pub or at his home, and he never testified at all, much less to not driving or any post-crash drinking. And again, to presume that Pontius drank afterwards is speculation upon which a judgment may not rest. *See Testerman v. Director of Revenue*, 31 S.W.3d at 473.

Ultimately, therefore, it is the information that officer has – and does not have – that drives the probable cause determination, not the hands on the clock. The Court of Appeals, Eastern District, explains it this way:

The gap in time between the accident and the arrest does not adversely affect the probable cause determination because Director is not required to prove the time an accident occurred. *Simmons v. Director of Revenue*, 3 S.W.2d 897 (Mo.App. S.D. 1999); *Haas v. Director of Revenue*, 975 S.W.2d 483, 485 (Mo.App. E.D. 1998); *Cain v. Director of Revenue*, 896 S.W.2d 724, 726 (Mo.App. E.D. 1995).

Misener v. Director of Revenue, 13 S.W.3d 666, 668 (Mo.App., E.D. 2000); *see id.* (driver told officer that crash occurred two and half hours earlier).

Pontius did not rebut the Director’s prima facie case

At trial, the Director submitted her case on the records, and Pontius presented no evidence. Because Pontius did not testify in his own behalf, this raises the presumption that anything he might have said would have been unfavorable to him. *McCarthy v. Director of Revenue*, 120 S.W.3d 760, 763 (Mo.App., E.D. 2003); *Smith v. Director of Revenue*, 77 S.W.3d 120, 122 (Mo.App., W.D. 2002). If Pontius’ collision with a parked car was purely accidental, and not due to impairment, and if upon his apparent return to the Days Inn Pub, he imbibed, he could have, at a minimum, a) told the officers the unfortunate sequence of events that evening, and/or b) testified to that effect. He did neither.

The AIR, and the witness statements contained therein, showed that the officers had reasonable grounds to arrest Pontius for driving while intoxicated, the statements were not hearsay and it was reversible error for the trial court not to admit the witness statements, either on that theory, or on the misguided theory that *Sooch v. Director of Revenue* compels that result.

Conclusion

In view of the foregoing, this Court should reverse the judgment of the trial court and remand the case with orders to reinstate the Director's revocation of Pontius' driving privileges.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 4th day of October, 2004, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,162 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Cheryl Caponegro Nield
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